INDEX

CITATIONS

641274—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1077

75 CASES, MORE OR LESS, EACH CONTAINING 24 JARS OF PEANUT BUTTER, LABELED IN PART (JARS): "TOP NOTCH BRAND", AND CONSOLIDATED CAUSES, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 32–37) is reported at 146 F. 2d 124. The opinion of the district court (R. 25–28) is reported at 54 F. Supp. 641.

JURISDICTION

The judgment of the circuit court of appeals was entered December 27, 1944 (R. 37–38). The

petition for a writ of certiorari was filed March 24, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an inspection by a food and drug inspector of a producer's records of interstate shipments, made with the producer's consent, was illegal by reason of the fact that the inspector failed to inform the producer that information obtained from such records might be utilized to determine whether adulterated foods had been shipped in commerce.

2. Whether the absence of such disclosure required the dismissal of libels for the condemnation of interstate shipments of allegedly adulterated foods discovered as the result of the examination of the producer's shipping records.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 676, 52 Stat. 1040, 21 U. S. C. 301 *et seq.*, provides in part:

> SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United

States within the jurisdiction of which the article is found: * * *

* * * * *

SEC. 703. For the purpose of enforcing the provisions of this Act, carriers engaged in interstate commerce, and persons receiving food, drugs, devices, or cosmetics in interstate commerce or holding such articles so received, shall, upon the request of an officer or employee duly designated by the Administrator, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any food, drug, device, or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any such record so requested when such request is accompanied by a statement in writing specifying the nature or kind of food, drug, device, or cosmetic to which such request relates: *Provided,* That evidence obtained under this section shall not be used in a criminal prosecution of the person from whom obtained: *Provided, further,* That carriers shall not be subject to the other provisions of this Act by reason of their receipt, carriage, holding, or delivery of food, drugs, devices, or cosmetics in the usual course of business as carriers.

SEC. 704. For purposes of enforcement of this Act, officers or employees duly desig-

nated by the Administrator, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein.

STATEMENT

Proceeding under Section 304 of the Federal Food, Drug, and Cosmetic Act (*supra,* pp. 2–3), the United States, on October 27, 1943, filed a libel of information in the District Court of the United States for the District of Maryland against approximately 75 cases of peanut butter, of which the Old Dominion Peanut Corporation, hereinafter referred to as petitioner, is the claimant, on the ground that it was adulterated under Section 402 (a) (3) of the Act (21 U. S. C. 342 (a) (3)) in that it consisted in whole or in part of a filthy substance by reason of the presence therein of insect fragments, rodent hair frag-

ments, rodent excreta fragments, and dirt (R. 1–2). Four other libels for condemnation were thereafter instituted against other shipments of petitioner's products on the same ground. These latter causes were consolidated for trial with the libel against the 75 cases (see R. 24, 25, 29–30.)

Petitioner is a corporation with its place of business in Norfolk, Virginia, engaged in manufacturing peanut butter and peanut candies. On or about October 15, 1943, Winton B. Rankin, an inspector of the Food and Drug Administration, appeared at petitioner's plant and obtained permission from Edgar S. Stubbs, president of petitioner, to make an inspection of the factory (R. 11–12, 17). In the course of his inspection, Rankin found rodent pellets and refuse in and around the food products (R. 18). He took samples of petitioner's product, which were placed in containers furnished by petitioner's plant superintendent (R. 17). After the inspection, Rankin advised Mizzell, petitioner's sales manager, and Stubbs, of his findings and asked permission to see petitioner's records of interstate shipments for the purpose of ascertaining where shipments of the food products were being made. The records were exhibited to Rankin without objection by Stubbs or Mizzell, and he made notations of the interstate shipments. (R. 13, 15–16, 18.)

On November 1, 1943, following the institution of the initial proceeding against the 75 cases of

peanut butter, Rankin returned to petitioner's plant and obtained permission from Stubbs to make a reinspection of the factory to determine whether the insanitary conditions found on the first inspection had been corrected (R. 19–20). The reinspection again showed the presence of rodent pellets and refuse, and Rankin photographed and took as evidence a dead mouse found in the candy manufacturing room (R. 20). The inspection was made and photographs of insanitary conditions were taken with the knowledge and consent of Stubbs and of Chapman, petitioner's plant superintendent (R. 17), and other evidence of such conditions was collected without objection from Chapman, to whose attention Rankin called these conditions (R. 20). After the inspection, Rankin informed Worsham, petitioner's secretary-treasurer, of the insanitary conditions which he had found on both visits, and he further advised Worsham that legal proceedings might result as a consequence of the inspection (R. 20–21). Rankin again asked for permission to inspect petitioner's invoice files for the stated purpose of making notations of interstate shipments, and advised Worsham that so far as he knew the law did not require that the invoices be opened for review (R. 21–22). Worsham stated that he had no objection to Rankin's request and permission was once more granted to examine these files. Rankin thereupon made notations of interstate shipments

of food products made by petitioner. (R. 22.) Subsequently, the four additional libels involved here were filed (see R. 24).

Petitioner filed a motion to suppress all evidence secured upon the inspections and for the return of the seized shipments and dismissal of the libels (R. 4–9). The district court held that the inspections of the factory were authorized by Section 704 of the Act (*supra*, pp. 3–4), but that the examination of petitioner's records of shipments was illegal for the reason that the inspector had failed fully to disclose his purpose in requesting permission to inspect such records (R. 26–28). The court thereupon entered an order impounding and suppressing all evidence taken from the books and records of petitioner and all samples taken from interstate shipments discovered as a result of the inspections of such records, directing the return to petitioner of the seized shipments, and dismissing the libels, with costs against the United States (R. 29–30).

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the order was reversed (R. 37–38).

ARGUMENT

1. It is undisputed, as both courts below found (R. 27, 33, 35), that responsible officials of petitioner gave the inspector permission to examine its records of interstate shipments. Petitioner's entire argument is predicated on the contention

that despite such consent the inspection of those records constituted an illegal search for the reason that the inspector failed to inform petitioner's officers that the information thus obtained might be used as a means of obtaining samples of interstate shipments and that condemnation proceedings might be instituted if such shipments were found to be adulterated. The record reveals, however, that inspector Rankin informed petitioner's president that he wished "to review his invoices for the purpose of ascertaining where shipments of food products were being made" (R. 23; see also R. 18, 21). We do not believe that he was under a duty to do anything more. Certainly a government investigator who frankly discloses the nature of the information which he seeks is not required at the peril of the Government to state all possible uses which may be made of the information.

The district court's conclusion that the permission given by petitioner's officers to inspect the shipping records was secured by a method which "smacks of surprise, if not of actual misrepresentation" (R. 27), was predicated upon the ground that, since Section 703 of the Act (*supra*, p. 3) provides a method by which records of interstate shipments may be obtained from carriers, the Government may not "bypass the specified method" (R. 27) without making a full disclosure of its purpose in asking for the shipper's

records (R. 26–27). We think the circuit court of appeals was clearly correct in holding that the district court misconstrued Section 703. That provision was intended merely to provide a means whereby such information could be obtained from persons other than the shipper. The absence of such a provision had been a definite handicap in the enforcement of the predecessor Food and Drugs Act of 1906 (21 U. S. C. (1934 ed.) 1, *et seq.*). See H. Rep. No. 2139, 75th Cong., 3d sess., p. 12. Clearly, Section 703 was not intended to preclude the Government from obtaining information concerning shipments from the shipper himself if consent to examination of his records is given. The section therefore does not have the effect, as the district court thought (R. 27), of imposing upon a food and drug inspector the extraordinary duty to warn a producer of all the possible purposes for which information so requested and obtained might be used.

2. In any event, the proceeding here involved is one to condemn illicit articles of commerce. *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57. Even if there had been an unlawful search of petitioner's records, the Government would not be foreclosed from having the property in issue condemned. For there is a clear distinction between the use in a criminal proceeding of evidence obtained by an illegal search and seizure, and the

condemnation of contraband property, the existence or location of which had been ascertained from information secured as the result of an illegal search or seizure. To require the surrender of the seized merchandise "would neither accord with the better authorities, nor give the claimant any real advantage. If we should assume a case in which the contraband merchandise was burglars' tools or narcotics, such a requirement would seem almost ludicrous." *United States* v. *Eight Boxes, etc.,* 105 F. 2d 896, 900 (C. C. A. 2); see also *Dodge et al.* v. *United States,* 272 U. S. 530, 532.

Boyd v. *United States,* 116 U. S. 616, upon which petitioner relies (see Pet. 11–16), is clearly distinguishable. The forfeiture invoked there was a penalty imposed by the statute upon the owner of the property, and the Court held that it constituted a punishment in the criminal sense. The merchandise itself was not outlawed and was not the offending thing. Here, however, the property seized consisted of food products which allegedly offended against the Food, Drug, and Cosmetics Act, and were therefore contraband which the law provides may be condemned in a proceeding against the products themselves. Though the statute contains criminal sanctions for violations, the provision for condemnation of offensive articles is no part of the criminal penalty.

CONCLUSION

The decison of the circuit court of appeals is correct. The case presents no question of general importance, and no conflict of decisions is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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